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No. 87-1838

In the Supreme Court of the United States

OCTOBER TERM, 1988

JUAN MEDRANO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 641 for selling government records or property.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is reported at 836 F.2d 861.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1988. A petition for rehearing was denied on March 8, 1988 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to accept a bribe, in violation of 18 U.S.C. 371, and 13 counts of selling or conveying government records or property, in violation of 18 U.S.C.

641.[1] He was sentenced to concurrent two-year prison terms on each count. The court of appeals affirmed on all but one substantive count, as to which it found the government's evidence insufficient (Pet. App. A3-A12).

1. The evidence at trial showed that petitioner was employed as an immigration inspector for the Immigration and Naturalization Service (INS) in El Paso, Texas. His duties included inspecting incoming travelers and vehicles at the international bridge in El Paso, as well as approving applications for border crossing cards. Such cards enable nonresident aliens to enter the United States and remain for up to three days. An applicant is not charged for the card, which remains valid and may be used repeatedly until it is revoked by the United States or is reported lost. Pet. App. A3, A4.

The application for a border crossing card is a three-part document that contains the original and two copies. If approved, the original is used to make a permanent laminated card about the size of a driver's license. The second sheet is maintained by the INS for its records, and the third sheet is given to the applicant to use as a temporary card. Pet. App. A4.

An applicant for a card must appear in person at the port of entry into the United States to complete and present his application. When the applicant appears at the port of entry, he delivers the application to the receptionist, who checks it for completeness and stamps it with the date and time. The applicant is then directed to the seating area until his name is called. Applications are handled on a first-come, first-served basis. Before the application is processed, a check is made to learn if the INS has an unfavorable record on the applicant. If such a

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[1] Petitioner was acquitted on 13 counts of accepting bribes, in violation of 18 U.S.C. 201(c)(1).

record is found, consideration of the application is postponed pending a further investigation. Pet. App. A4-A5.

If no unfavorable record is located, the applicant is interviewed. The inspector reviews the data on the application, questions the applicant, and verifies the required supporting documentation establishing Mexican citizenship, employment, and domicile. Once the inspector determines that a card should be issued, he signs and dates the application and stamps it with his personal stamp. The applicant is then given the third copy of the application to use until he receives his permanent card. Pet. App. A5.

2. Petitioner was convicted of devising a system with two taxicab drivers from Juarez, Mexico, under which the drivers provided him with lists of individuals seeking border crossing cards. Under the scheme, petitioner would tell the drivers when to have these "customers" appear at the INS office for processing, and he would provide predated stamped blank application forms for them. The customers would then appear at the INS office with completed forms. Instead of proceeding through the normal channels of several employees, the customers would be called directly to petitioner. Petitioner would run the necessary computer check, approve the application, and issue a temporary border crossing card. The issuance of a temporary card by petitioner virtually guaranteed the issuance of a permanent card, since petitioner's supervisor merely duplicated the computer check before issuing a permanent card. Petitioner received $50 for each application he approved, although each customer paid more than $100 for the entire transaction. Pet. App. A5-A6.

3. On appeal, petitioner argued that the government failed to prove that he had violated 18 U.S.C. 641.[2] First,

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[2] Section 641 is violated by anyone who "without authority, sells, conveys or disposes of any record * * * or thing of value of the United

he claimed that there was insufficient evidence to establish that he "sold, conveyed or disposed" of a "record * * * or thing of value" within the meaning of Section 641. Second, petitioner asserted that the evidence was insufficient to establish that the value of each of the cards exceeded $100. Pet. App. A8-A9.

The court of appeals rejected both contentions (Pet. App. A8-A10). With respect to petitioner's first claim, the court reasoned that "a temporary card provides the bearer with the same rights as a permanent card," and that petitioner's "approval of the application for the temporary card virtually assured the applicant of obtaining a permanent card" (*id.* at A9). The court pointed out that petitioner accepted fees to approve applications of people who, for various reasons, were not qualified to receive a border crossing card (*ibid.*). Moreover, the court noted, petitioner was "not merely providing a service" but instead was "selling the actual card" (*ibid.*).

In rejecting petitioner's second argument, the court found that, as to all but one count, the evidence was sufficient to establish that the price paid by the customers was in excess of $100. Although petitioner personally received only $50 per customer, the court held that "the value of the government property sold by [petitioner] is determined with respect to the entire transaction, culminating in the applicant's possession of a permanent Border Crossing Card" (Pet. App. A9-A10). The court found that, as deter-

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States or of any department or agency thereof * * *." Under that section, a violator "[s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." Thus, to convict a person of a felony under Section 641, the value of the property must exceed $100. The statute defines "value" as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

mined by " 'market forces—the price at which the minds of a willing buyer and seller would meet,' " the evidence established that the value of the border crossing cards exceeded $100 (*id.* at A10 (citation omitted)).[3]

ARGUMENT

Petitioner renews his contentions that (1) he did not sell, convey, or dispose of government property and (2) the border crossing cards were not worth more than $100 (Pet. 7-16). Those factbound contentions lack merit and do not warrant review by this Court.

1. Petitioner contends (Pet. 10) that Section 641 does not apply to the sale of the "intangible right of crossing into the United States." Relying on *McNally* v. *United States*, No. 86-234 (June 24, 1987), he argues (Pet. 10-12) that Section 641 should be limited to cases where the government has been deprived of "money or property." Petitioner, however, fails to take into account the broad language of Section 641, which expressly prohibits the sale of any government "record * * * or thing of value." A temporary border crossing card is both a "record" and a "thing of value" and thus falls within the broad statutory language.

The case law supports the court of appeals' construction of the statute. This Court has recognized that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S.

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[3] With respect to one count, the court of appeals found the evidence insufficient to establish that more than $100 had changed hands (Pet. App. A6).

246, 269 n.28 (1952). Following that interpretation, the courts of appeals have repeatedly upheld larceny convictions under Section 641 for the sale of government documents or records. See, *e.g., United States* v. *Jeter,* 775 F.2d 670, 679-682 (6th Cir. 1985) (upholding Section 641 conviction of a defendant who had illegally obtained and distributed imprinted carbon sheets used in the typing of secret grand jury documents and proceedings; the court noted that "Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities."), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Girard,* 601 F.2d 69, 70-71 (2d Cir.) (upholding conviction of a former DEA agent who obtained and distributed confidential records; the court stated that "[a]lthough the content of a writing is intangible, it is nonetheless a thing of value"), cert. denied, 444 U.S. 871 (1979); *United States* v. *DiGilio,* 538 F.2d 972, 976-978 (3d Cir. 1976) (affirming Section 641 conviction of a defendant who obtained confidential information and documents from FBI files), cert. denied, 429 U.S. 1038 (1977); cf. *United States* v. *Croft,* 750 F.2d 1354, 1359-1362 (7th Cir. 1984) (upholding conviction of university professor who misappropriated services of student research assistant for his own use, where the assistant was paid from government funds). Accordingly, petitioner errs in arguing that Section 641 should not apply to something that can be characterized as "intangible."

Even if the temporary border crossing card did not qualify as a "thing of value," it would still be within the reach of the statute because it constitutes a government "record" within the meaning of Section 641. See generally *DiGilio,* 538 F.2d at 977 ("[a] duplicate copy is a record

for purposes of the statute * * *"). Petitioner's convictions are thus valid under that alternative ground.[4]

There is likewise no merit to petitioner's contention (Pet. 8-9, 14-15) that the issuance of temporary cards for a fee is not a violation of Section 641 because such cards do not necessarily ensure the subsequent issuance of permanent cards by higher authorities within the INS. As the court of appeals noted, the permanent card "virtually always issues 90 days after the issuance of the temporary Border Crossing Card" (Pet. App. A5-A6). The only remaining hurdle is another computer check (*id.* at A6). And petitioner testified that he personally checked the computer information on each of the special applications he processed, making certain that his approvals would stand (Gov't C.A. Br. 13). The value of the temporary cards to petitioner's customers was therefore equivalent to the value of the permanent cards they were assured of receiving.

2. Petitioner also claims (Pet. 4-5) that the evidence failed to establish that the documents he sold had a value in excess of $100. In fact, with the exception of the one count that was reversed by the court of appeals, the

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[4] Contrary to several other circuits, the Ninth Circuit has indicated that Section 641 does not apply to "intangible goods," such as "classified information." *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir. 1987), cert. denied, No. 87-6545 (Apr. 4, 1988); *Chappell* v. *United States*, 270 F.2d 274, 278 (9th Cir. 1959). The conflict among the circuits on that point is not material to the disposition of this case, however, because even in the Ninth Circuit, the border crossing cards at issue in this case would qualify as tangible property falling within the scope of Section 641. See *Tobias*, 836 F.2d at 451-452 (upholding conviction involving cards used to code and decode top secret messages); *United States* v. *Bigelow*, 728 F.2d 412, 413 (9th Cir.) (upholding conviction involving stolen credential of IRS agent), cert. denied, 469 U.S. 868 (1984). Moreover, as we have noted, even if they are not "thing[s] of value," the border crossing cards constitute government records under Section 641.

evidence plainly showed that all of the applicants paid more than $100 for their border crossing cards (see Pet. App. A10).[5] As the court of appeals noted (*id.* at A9-A10), it is irrelevant that petitioner received only a $50 share for each transaction. The value of the property under Section 641 must be determined with reference to its market price, not with reference to the profit from the sale received by a particular defendant.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

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[5] Since the documents had no face value and no value in a legitimate market, the value of the property in an illegal market is determinative. See, *e.g.*, *United States* v. *Bigelow*, 728 F.2d 412, 413-414 (9th Cir.), cert. denied, 469 U.S. 868 (1984); *United States* v. *Devall*, 462 F.2d 137, 143 & n.16 (5th Cir. 1972). As the court of appeals held, the illegal market value under Section 641 is " 'the price at which the minds of a willing buyer and a willing seller would meet' " (Pet. App. A10 (quoting *United States* v. *DiGilio*, 538 F.2d at 979)).

[6] Petitioner also argues (Pet. 15) that even though he received concurrent prison terms on all counts, the concurrent sentence doctrine should not apply in this case. Because petitioner's convictions on all 13 counts that the court of appeals upheld were clearly valid, the court of appeals did not rely on the concurrent sentence doctrine, nor do we.

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